IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MATTHEW HOGAN, *Plaintiff,* vs. BEXAR COUNTY, STATE OF TEXAS, SHERIFF JAVIER SALAZAR, *Defendants.*	§ § § § § § § § § § §	SA-19-CV-00255-DAE

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge David A. Ezra:

This Report and Recommendation concerns Defendants Bexar County and Bexar County Sheriff Javier Salazar's Motion to Dismiss [#128]. All pretrial matters have been referred to the undersigned for disposition pursuant to Western District of Texas Local Rule CV-72 and Appendix C [#120]. The undersigned has authority to enter this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

In considering the motion before the Court, the undersigned also considered Plaintiff's Response [#132] and Defendant's Reply [#133]. For the reasons set forth below, the undersigned recommends that Defendant's Motion to Dismiss [#128] be granted.

I. Background & Procedural History

Plaintiff Matthew Hogan is an inmate currently housed at Travis County State Jail. (Notice of Change of Address [#134], at 1.) Plaintiff originally filed this case in March 2019,

when he was a pre-trial detainee at Bexar County Adult Detention Center ("BCADC") [#1].[1] Plaintiff proceeded *pro se* until he retained Anthony Cantrell as counsel, whose first appearance was September 14, 2020 [#118]. Subsequent to Plaintiff's retention of counsel, the undersigned granted Plaintiff leave to file a Fourth Amended Complaint [#124], which is the live pleading in this case.

In the live pleading, Plaintiff alleges that while he was a pre-trial detainee at BCADC, Defendants Bexar County ("the County") and Bexar County Sheriff Javier Salazar ("the Sheriff"), in his official capacity, breached the duty of care owed to Plaintiff and violated his civil rights. (Fourth Am. Comp. [#126] ¶ 11–12.) Specifically, Plaintiff alleges that between January 6, 2019 and January 8, 2019, he was confined to a cell at BCADC that had raw sewage on the floor due to plumbing issues and had no running water. (*Id.* at ¶ 5.) Plaintiff further alleges that between May 16, 2019 and May 18, 2019, his cell did not have running water. (*Id.* at ¶ 7.) Plaintiff filed a grievance regarding each incident. (*Id*. at ¶¶ 5, 7.) Plaintiff also alleges that he was sexually harassed by a Deputy Larious on January 1, 2019 when, during Larious's check of Plaintiff cell, Larious said "you know what time it is" and grabbed his own groin area. (*Id.* at ¶ 8.) Plaintiff filed a grievance against Larious on January 8, 2019. (*Id*. at ¶ 9.) Plaintiff alleges that the plumbing and water issues caused Plaintiff to "sustain[] injuries, requiring multiple treatments at the University Health Systems in San Antonio, Texas." (*Id.* at ¶ 10.) Plaintiff does not specify what alleged injuries he sustained.

[1] While Plaintiff was a pre-trial detainee at the time of the incidents giving rise to his claim, Plaintiff was convicted on July 29, 2020, and he is currently serving his sentence. Bexar County Case Number 2017-CR-13464. *See Norris v. Hearst Trust*, 500 F.3d 454, 469 n.8 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.")

Plaintiff claims that his injuries were proximately caused by Defendants' negligent, careless, and reckless disregard of Defendants' duty of reasonable care. (*Id.* at ¶ 13.) Plaintiff also claims that Defendants deprived him of his rights under ABA Criminal Justice Standard 23-3.3(a)(c), which articulates a right to an adequate single cell with living quarters and personal hygiene areas. (*Id.* at ¶ 11.) Regarding the alleged sexual harassment, Plaintiff asserts that Defendants are liable for the negligent hiring of Deputy Larious. (*Id.* at ¶ 13.) Plaintiff's requested relief is damages for physical and mental pain and suffering as well as exemplary damages for gross negligence. (*Id.* at ¶¶ 15, 17.)

The motion before the Court is Defendants' Motion to Dismiss Plaintiff's Fourth Amended Complaint [#128] for lack of subject matter jurisdiction and for failure to state a claim. In Plaintiff's Response to this motion, he requests that his claim about the inadequate cell conditions depriving him "of his rights" be considered under 42 U.S.C. § 1983, and not, as he pleaded, under the ABA Criminal Justice Standards. (Pl. Resp. [#132], at 2.) He does not include any additional facts or attempt to replead his claim specific to the Section 1983 standards. The undersigned will construe Plaintiff's civil rights claim as a Section 1983 claim.

Plaintiff has also filed a Fifth Amended Complaint to clarify his intention to pursue his civil rights claim pursuant to Section 1983 [#136]. He did so without seeking leave of the Court, and thus the pleading should be struck. *See* Fed. R. Civ. Pr. 15(2) ("A party may amend its pleading only with the opposing party's written consent or the court's leave."). Regardless, Plaintiff and Defendants agree that the Fifth Amended Complaint does not present new factual allegations that would render moot Defendants' Motion to Dismiss Plaintiff's Fourth Amended Complaint. (Advisory [#137], at 2.) Thus, the undersigned's recommendation herein would be the same if Plaintiff's Fifth Amended Complaint were the live pleading.

II. Legal Standard

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject-matter jurisdiction of the district court to hear a case. *See* Fed. R. Civ. P. 12(b)(1); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). When a court's subject matter jurisdiction is factually attacked, the court may consider matters outside of the pleadings. *Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981). Where a motion to dismiss for lack of jurisdiction is limited to a facial attack on the pleadings, as here, however, it is subject to the same standard as a motion brought under Rule 12(b)(6). *See Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008); *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992). In facial attacks, the court must accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004); *O'Rourke v. United States*, 298 F. Supp. 2d 531, 534 (E.D. Tex. 2004) (applying this standard to Rule 12(b)(1) motion). The burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Ramming*, 668 F.3d at 161.

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although a complaint "does not need detailed factual allegations," the "allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The allegations pleaded must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

Generally, in deciding a motion to dismiss, a court may not look beyond the four corners of the Plaintiff's pleadings without converting the motion to a motion for summary judgment. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir. 1999); Fed. R. Civ. P. 12(d). The Court may, however, consider documents attached to the complaint and those that are central to the claims at issue and incorporated into the complaint by reference. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (internal quotation omitted). However, a Court need not credit conclusory allegations or allegations that merely restate the legal elements of a claim. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016) (citing *Iqbal*, 556 U.S. at 678). In short, a claim should not be dismissed unless the court determines that it is beyond doubt that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief. *See Twombly*, 550 U.S. at 570.

III. Analysis

In his Fourth Amended Complaint ("the live pleading"), Plaintiff asserts both state tort law and civil rights claims. With regard to the tort claims, Defendants argue that the Court lacks subject matter jurisdiction because the claims are barred by governmental immunity, as Plaintiff did not provide Defendants proper notice of the negligence claim within six months of the alleged incident as required under the Texas Tort Claims Act. In Plaintiff's response, Plaintiff contends that he gave proper notice to Defendants when he filed his original grievances with BCADC.

Turning to Plaintiff's civil rights claim, as stated above, Plaintiff requested in his Response that the Court construe his civil rights claim under Section 1983 rather than under the ABA Criminal Justice Standards. Defendants then filed a Reply, in which they argue that that Plaintiff's Section 1983 claim is insufficiently plead and should be dismissed under Rule 12(b)(6). Defendants also argue that given Plaintiff's claims against the County, the claims against the Sheriff are redundant and should be dismissed under Rule 12(b)(6).

For the reasons below, the undersigned finds that: (1) Plaintiff's negligence claims are barred by the Texas law doctrine of governmental immunity and should be dismissed under Rule 12(b)(1); and (2) Plaintiff's Section 1983 claim should be dismissed under Rule 12(b)(6) for failure to state a claim.

A. Plaintiff's negligence claims fail as a matter of law because he is barred from suing the Sheriff and because the County was not given proper notice of the claim.

Plaintiff sues Defendants for negligence. Under Texas law, political subdivisions of the State, like the County, are afforded governmental immunity for negligence claims. *See* Tex. Civ. Prac. & Rem. Code § 101.001(3)(B); *Dallas Cnty. Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). Governmental immunity generally protects municipalities and other state subdivisions from suit unless immunity has been waived by the constitution or state law. *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014) (citing *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994)). The Texas Tort Claims Act ("TTCA") waives governmental immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code § 101.021(2). The waiver could apply here because Plaintiff complains of defective conditions in his jail cell.

1. Claims against the Sherriff

The negligence claim against the Sheriff should be dismissed. Under the TTCA, "[i]f a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." *Id*. at § 101.106(e). Because Plaintiff has sued both the County and the Sheriff in his official capacity for identical negligence claims, and the County has filed a motion for the negligence claim to be dismissed against the Sheriff, the claim against the Sheriff should be dismissed in accordance with the TTCA.

2. Claims against the County

The negligence claim against the County should be dismissed because Plaintiff did not provide proper written notice of the claim and because the County did not otherwise have actual notice.

Inadequate written notice. A governmental entity is entitled to receive notice of a claim against it no later than six months after the day the incidents giving rise to the claim occurred. *Id.* § 101.101(a). Where a plaintiff does not provide a governmental unit with proper, timely notice of its claim, the court lacks subject matter jurisdiction to hear the claim. *See City of Dallas v. Carbajal*, 324 S.W.3d 537, 539 (Tex. 2010). The purpose of the notice requirement is to ensure prompt reporting of claims to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). The written notice must reasonably describe the damage or injury claimed, the time and place of the incident, and the incident. *See* Tex. Civ. Prac. & Rem. Code § 101.101(a).

It is essential that the written notice to the governmental unit describes all three elements—injury, time and place, and incident—so that it can adequately respond to the claim. In *Casanova*, the plaintiffs sued a state hospital for the death of a family member. *See Casanova v. Tomball Reg'l Hosp. Auth.*, 01-04-00136-CV, 2006 WL 23407, at *1 (Tex. App.—Houston [1st Dist.] Jan. 5, 2006, no pet.). The district court ordered summary judgment in favor of the hospital because the plaintiffs did not give the hospital actual or written notice of their claim within six months of the alleged incident. *Id*. On appeal, the plaintiffs claimed that they did give the hospital proper notice because their attorney wrote two letters to the hospital about his representation of plaintiffs for "injuries sustained" by the family member and requested the medical and billing records of the deceased. *Id.* at *3. The appellate court affirmed the summary judgment order, holding that neither of the two letters to the hospital fulfilled the statutory notice requirements because they neither reasonably described the injury claimed nor the alleged incident. *Id.*

In contrast, in *Morris*, the Texas appellate court found that plaintiff had provided the Dallas Area Rapid Transit ("DART") with proper notice of his claim because his petition: described the time and place of the incident; stated that he "experience[d] severe personal injuries after entering a DART bus" because the driver's actions caused him to "lose his balance and violently fall to the ground"; and stated that he required "extensive medical treatment." *Dallas Area Rapid Transit v. Morris*, 434 S.W.3d 752, 761–62 (Tex. App.—Dallas 2014, pet. denied).

Like the plaintiffs in *Casanova*, and in contrast to the plaintiff in *Morris*, Plaintiff here provided incomplete—and thus, legally inadequate notice—of his claim. Plaintiff contends that he provided timely written notices to the County about his claims. But his notices were either

untimely or failed to reasonably describe any injury. In his live pleading, Plaintiff's allegations concern incidents that occurred in January and May 2019. (Fourth Am. Compl. [#126] ¶¶ 5, 7, 8.) Plaintiff filed grievances with BCADC personnel in January 2019 and May 2019 following each of these incidents. (Pl. Grievances [#128-1], at 1–2, 6–7.) But the grievances do not allege any injury resulting from the incidents, so the grievances did not satisfy one of the notice requirements. In his First Amended Complaint [#6], Plaintiff did allege injuries of emotional distress and anxiety from the January 2019 incidents, but this pleading was not served on Defendants until September 2019 [#14], more than six months after the incidents. Therefore, this notice was not timely. After his May 2019 grievance with BCADC, Plaintiff did not refer to the May 2019 incident until he filed his Second Amended Complaint [#38] in October 2019. Although this notice is timely, it is inadequate because the Second Amended Complaint does not allege any injury resulting from the May 2019 incidents.

To fulfill the statutory requirements of notice under the TTCA, Plaintiff was not required to provide a detailed description of an injury, but, like the plaintiff did in *Morri*s, he had to at least put the County on notice that an injury occurred from the alleged incidents. The issue here is not that Plaintiff described an injury too vaguely; rather, he failed to allege that any injury occurred **at all**. By failing to allege injuries in his grievances and in his Second Amended Complaint and failing to timely notify Defendants of the January 2019 incidents in his First Amended Complaint, Plaintiff's written notices do not satisfy the TTCA notice requirement.

No actual notice. Plaintiff could still satisfy the TTCA notice requirement if the County had actual notice of the claim within six months of the incidents. The written notice requirements in the TTCA do not apply if the governmental unit has actual notice. *See* Tex. Civ. Prac. & Rem. Code § 101.101(c). A governmental unit has actual notice under the TTCA if it

has subjective knowledge of (1) a death, injury, or property damages; (2) the governmental unit's fault that produced or contributed to the death, injury, or property damages; and (3) the identity of the parties involved. *City of San Antonio v. Tenerio*, 543 S.W.3d 772, 776 (Tex. 2018) (citing *Cathey*, 900 S.W.2d at 341). Here, Plaintiff does not allege that the County had actual notice of any injury he allegedly sustained from the alleged plumbing and water issues or the alleged sexual harassment. In sum, the County had neither written nor actual notice of Plaintiff's claims within six months of the incidents, and thus, governmental immunity is not waived. The Court does not have subject matter jurisdiction over Plaintiff's negligence claims, which should be dismissed.

B. The Court should also dismiss Plaintiff's Section 1983 claim against the Sheriff and the County.

Plaintiff does not plead any federal claims in his live pleading, the Fourth Amended Complaint; however, in his response to Defendants' Motion to Dismiss, he asks to construe the civil rights claim in his live pleading—which is pleaded under the ABA Criminal Justice Standards—as a Section 1983 claim. The undersigned will do so in evaluating Defendants' motion to dismiss.[2]

Plaintiff pleads the same civil rights violation against both the County and the Sheriff in his official capacity. Of course, a federal claim against a county employee in his official capacity is the equivalent of a claim made against the county. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978). Thus, the Section 1983 claim against the Sheriff should be dismissed because it is redundant.

[2] To the extent that Plaintiff seeks leave to file a fifth amended complaint, it would be futile to allow it because Plaintiff's Section 1983 claim fails as a matter of law. *See Matter of Life Partners Holdings, Inc*, 926 F.3d 103, 125 (5th Cir. 2019) ("Leave to amend need not be granted when the amended pleadings would not withstand a motion to dismiss for failure to state a claim.") (internal quotation omitted).

As for the Section 1983 claim against the County, Plaintiff has failed to plead sufficient facts in support of the claim, and it should be dismissed. At all times relevant to the matters in this case, Plaintiff was a pre-trial detainee. A pre-trial detainee who asserts a challenge concerning his confinement under Section 1983 invokes the Fourteenth Amendment. *See Cadena v. El Paso City*, 946 F.3d 717, 727 (5th Cir. 2020); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 639 (5th Cir. 1996). The State owes both pre-trial detainees and convicted inmates the duty to provide for basic human needs, which includes a duty to provide adequate medical care and to protect from harm. *Hare*, 74 F.3d at 650.

A municipality or county can be liable for the deprivation of a pre-trial detainee's Fourteenth Amendment rights. *Garza v. City of Donna*, 922 F.3d 626, 632 (5th Cir. 2019). In alleging a case of this kind against a municipality or county, the cause of the constitutional violation is characterized either as (1) a condition of confinement, or (2) an episodic act or omission. *See Hare*, 74 F.3d at 644–45. Conditions of confinement cases involve "general conditions, practices, rules, or restrictions of pretrial confinement." *Id.* at 644. Cases that concern episodic acts or omissions involve "a particular act or omission of one or more officials," and "an actor usually is interposed between the detainee and the municipality." *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (en banc). Plaintiff has not pleaded facts that could give rise to the County's liability under either theory.

1. *Conditions of confinement*

Where a pre-trial detainee challenges the conditions of his confinement against a municipality, "the proper inquiry is whether those conditions amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Fifth Circuit has held that a condition may take the form of "a rule," a "restriction," "an identifiable intended condition or practice," or

"acts or omissions" by a jail official that are "sufficiently extended or pervasive." *Garza*, 922 F.3d at 632 (quoting *Est. of Henson v. Wichita Cnty., Tex.*, 795 F.3d 456, 468 (5th Cir. 2014) (citations omitted)). For example, where a detainee complains of the number of bunks in his cell or his television or mail privileges, the wrong of which he complains is a condition of confinement. *Scott*, 114 F.3d at 53. The conditions must not be "reasonably related to a government objective" and must cause the inmate's constitutional deprivation. *Garza*, 922 F.3d at 632–33 (citing *Wolfish*, 441 U.S. at 535).

A plaintiff must show that the complained of condition is more than a *de minimis* violation. "[I]solated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate . . . Rather, a detainee challenging jail conditions must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs." *Duvall v. Dallas Cnty., Tex.*, 631 F.3d 203, 208 (5th Cir. 2011) (quoting *Shepherd v. Dallas Cnty.*, 591 F.3d 445, 454 (5th Cir. 2009)). In *Duvall* the plaintiff, a pre-trial detainee, contracted a staph infection in the jail that caused him to lose use of one of his eyes. *Id.* at 206. The plaintiff claimed that the county had deprived him of his rights to due process by subjecting him to an unconstitutional condition of confinement, and the jury found for the plaintiff. *Id.* On appeal, the Fifth Circuit affirmed the district court's judgment because the plaintiff provided ample evidence of serious, extensive, and extended violations by the county because of "bizarrely high incidence[s]" of staph infections in the jail with about 200 infections per month. *Id.* at 208.

In *Estate of Henson*, the plaintiffs, family members of a pre-trial detainee who died in custody, filed a Section 1983 lawsuit alleging that the county violated the deceased's Fourteenth Amendment rights by denying him medical care. *Est. of Henson*, 795 F.3d at 461. The trial

court granted summary judgement in favor of the county. *Id.* The Fifth Circuit affirmed, noting that the only evidence that the plaintiffs presented to prove that the jail's medical system and staffing policies amounted to punishment was evidence that one other inmate had died four months prior to that of the plaintiffs' relative. *Id.* at 470. The Fifth Circuit held this was not enough because the plaintiffs needed to show more than one isolated incident to establish that "serious injury and death were inevitable results" of the jail's practices. *See id*. at 469 (quoting *Shepherd*, 591 F.3d at 454).

For his Complaint to survive a motion to dismiss, Plaintiff is not required to *prove* extensive patterns of serious deficiencies by Defendants; however, he is required to *plead* at least something resembling a pattern of serious deficiencies. Here, Plaintiff complains merely of isolated incidents of plumbing and running water issues and one incident of alleged sexual harassment by a deputy in his cell. Therefore, Plaintiff's allegations are insufficient to properly plead a conditions of confinement claim.

2. *Episodic acts or omissions*

To establish municipal liability in an episodic-act case, Plaintiff must show "(1) that the municipal employee violated the pretrial detainee's clearly established constitutional rights with subjective deliberate indifference; and (2) that this violation resulted from a municipal policy or custom adopted and maintained with objective deliberate indifference." *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 528–29 (5th Cir. 1999). Here, Plaintiff has not pleaded sufficient facts in support of the second element, that any alleged violations stemmed from a municipal policy or custom.

To establish that a violation resulted from a municipal or county policy or custom adopted and maintained with objective deliberate indifference, a plaintiff must point to either

"written policy statements, ordinances, or regulations" or "a widespread practice that is so common and well-settled as to . . . fairly represent [] municipal policy" that was the moving force behind the violation. *Cadena*, 946 F.3d at 728 (quoting *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) (internal citations omitted)). In *Sanchez I*, a pre-trial detainee committed suicide in her cell and her family sued Young County alleging a Section 1983 violation. *Sanchez v. Young Cnty. (Sanchez I)*, 866 F.3d 274, 278 (5th Cir. 2017). The district court granted summary judgement for the county, finding the plaintiffs had not submitted sufficient evidence to support an episodic-acts claim. *Id.* The Fifth Circuit affirmed, and held that the plaintiffs failed to present evidence of a policy or custom that caused the violation of the detainee's rights because the only evidence submitted concerned the deceased detainee's case. *Id*. at 280. The plaintiffs presented no evidence of similar maltreatment of any other detainees at the jail, and thus, the plaintiffs failed to present evidence of a common and well-settled practice. *Id.* The Fifth Circuit affirmed the district court's judgment to the extent it rejected plaintiffs' episodic acts and omissions claim. *Id.* at 281.

Plaintiff has not alleged that there was a written policy or custom at BCADC from which the alleged constitutional violation stemmed. Like the plaintiffs in *Sanchez I* Plaintiff points only to his own alleged mistreatment, not that of any other inmates, merely alleging isolated, personal incidents where jail officials did not promptly respond to the sewage and water issues in his cell or to his allegation of sexual harassment. "A municipality is almost never liable for an isolated unconstitutional action on the part of an employee." *Sanchez I*, 866 F.3d at 280 (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)). To establish the County's liability, Plaintiff must do more than alleged misconduct on the party of a few jail officials, because municipal liability predicated on *respondeat superior* is a claim flatly rejected by the

Supreme Court. *See Monell*, 436 U.S. at 691; *Bd. Of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 403 (1997). In sum, because Plaintiff has failed to sufficiently plead a condition-of-confinement or an episodic acts or omissions claim against the County, Plaintiff's Section 1983 claim should be dismissed.

IV. Conclusion and Recommendation

Accordingly, having considered Defendant's motion, the responses and replies thereto, the live pleadings, and the governing law, the undersigned **RECOMMENDS** that Defendants' Motion to Dismiss [#128] be **GRANTED** as set forth herein.

V. Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the Clerk of Court and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained

in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the un-objected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED this 27th day of April, 2021.

ELIZABETH S. ("BETSY") CHESTNEY
UNITED STATES MAGISTRATE JUDGE